IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO. 299 OF 1994

The State of Maharashtra .. Appellant
(Org.Complainant)

Vs.

1. Dashrath Bapu Akolkar
31 yrs. Occupation:Labourer
r/o : 28, Nana Peth, Pune

2. Shivaji Nana Jadhav
32 yrs. Occupation: Carpenter
r/o : 303, Nana Peth, Pune. .. Respondents
(Org. Accused)

Smt. V.R. Bhosale, APP for Appellant-State.
Respondents served.

CORAM : S.S. PARKAR & S.R. SATHE, JJ.

Date : October 01, 2004.

ORAL JUDGMENT (PER S.S. PARKAR,J.):

1. This appeal has been filed by the State challenging the Judgment and Order dated 27/1/1994 delivered by the Additional Sessions Judge, Pune acquitting the respondents-accused of the offences under Section 29, 17 and 21 read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 in Sessions Case No.103 of 1993. The respondents-accused though are served have not engaged any advocate, though by their writings dated 12/10/1994 and 25/8/1994 respectively they had stated that they would engage their lawyers at their own

expense. Since no one appears on behalf of the respondents-accused we had no option but to proceed exparte on merits in the appeal against them in their absence, as no other pair of advocates was available even in subsequent matters, following the ratio of the judgment of the three judges Bench of the Supreme Court in the case of Bani Singh vs. State of U.P., **1996 Cri.L.J. 3491 (S.C.).**

2. This is the third matter in a row where we are going to set aside the order of acquittal recorded by the same Additional Sessions Judge, Pune under the provisions of NDPS Act on some flimsy grounds when there was due compliance with all the mandatory provisions of the NDPS Act.

3. The prosecution case briefly narrated is as follows:-

. PW 3 API Rajendrasinha Mohite, who was attached to Khadak Police Station at the relevant time, had received an information at about 6.45 p.m. on 9/1/1993 that two persons possessing gard powder i.e. brown sugar were packing the powder in packets at the rear side of the public latrine in front of house no.331 at Ghorpade Peth in the shed. The

informant had also given descriptions of two persons and the clothes they were wearing on that day. The information was reduced to writing by API Mohite which is produced at Exh.30 and was shown to his superior, Police Inspector, Vigilance, attached to Khadak Police Station immediately and his permission was obtained to arrange for a raid. API Mohite, therefore, arranged for two panchas and prepared report that he was proceeding for raid. The said report was entered into station diary. The police and panchas went in a Jeep near the spot. They saw two persons sitting near the public latrine and were wearing the clothes as per the description given in the information received by API Mohite. The said two persons were having packets kept in front of them. API disclosed his identity to the accused and asked their names. Accused were asked to take search of the raiding party. The accused took the search of the members of the raiding party but they did not find anything incriminating. Thereafter the accused were apprised of their right to offer search before either nearest Magistrate or a Gazetted Officer under the Act but they declined. On the search being taken of accused no.1, 50 small packets containing powder were found in left side pocket of shirt along with cash of Rs.31/-. On the search being taken of accused no.2, 50 small packets containing

powder and a sum of Rs.20/- were found in the left side pocket of his shirt. The raiding party also found 375 small packets of powder on the newspaper lying in front of the accused. All the packets weighed 89.700 grams along with covers. All the packets were wrapped in a paper and tied with a thread. A paper label bearing signatures of the panchas and API was affixed on it and that packet was sealed with lakh seal. The panchanama was drawn of the seizure which is Exh.26. Copy of the panchanama was given to each of the accused and their acknowledgements were obtained. The accused were arrested and they were told why they were being arrested by writing 'Samaz-Patra' given to them, copies whereof are produced at Exhs.32 and 33. The muddemal property and accused were brought to the police station and the officer lodged complaint which is at Exh.34. He also prepared report to the superior which is at Exh.35. The crime was registered at the police station and the muddemal articles were handed over to the Inspector in sealed condition along with the report Exh.36. PW 3 API Mohite gave compliance report under Section 57 of the Act which is at Exh.37. API then recorded the statements of the members of the raiding party and the muddemal articles were sent to C.A. C.A. report dated 16/2/1993 is produced at

Exh.38, according to which the contents of the samples were found to be heroin. After the investigation was over charge-sheet came to be filed in the Sessions Court.

4. In the Sessions Court, Additional Sessions Judge framed charges against both the respondents accused for offence under Section 29 and for offences under Sections 27 and 21 simpliciter and also for offences under Sections 17 and 21 read with Section 29 of the NDPS Act, to which both the respondents-accused pleaded not guilty. On behalf of the prosecution three witnesses were examined. PW 1 is Police Naik Ganpat Mashalkar. He had, as per the instructions of Inspector Chandgude, entered the muddemal articles in the muddemal register on the date of the incident and affixed seal of the police station on the muddemal articles. He had also carried the muddemal articles to the office of C.A. on 11/1/1993. PW 2 is Dattu Khavale, who acted as panch at the time of raid and lastly PW 3 is API Rajendrasinha Mohite, who had received the information and carried the raid as per the information and investigated the case and filed charge-sheet. The defence of the accused was of denial.

5. After considering the evidence on record the Additional Sessions Judge, Pune by his impugned judgment and order dated 27/1/1994 acquitted both the respondents-accused, which is under challenge in this appeal filed by the State.

6. We have gone through the evidence of prosecution witnesses, the documentary evidence and also the reasoning of the trial court carefully as the accused are not represented and heard the learned APP for appellant-State. We find that the prosecution has led evidence of PW 3 API Mohite, who had investigated the case, which is supported by panch witness and the evidence of Police Naik, who was attached to the said Police Station. From the evidence it is clear that the raid was arranged due to the information received by PW 3 API Mohite. The said information was reduced to writing as per Section 42 of the Act and is produced on record at Exh.30. He had also prepared report about the information received by him and submitted it to his superior PI Chandgude. PI Chandgude had acknowledged for having seen the gist of information reduced to writing at Exh.30, by writing endorsement on it that he had seen it and put his signature and date of 9/1/1993. The prosecution has also produced on record Exh.29 which is a report

submitted by API Mohite to his superior on which endorsement has been made to arrange for raid and report about the matter. Thus, there is compliance with the provisions of Section 42(1) as well as 42(2) of the NDPS Act. At the time of raid when search was offered to the accused of the members of the raiding party the accused had taken search of the members of the raiding party but did not find any incriminating articles in their possession. Officer had apprised the accused of their right under Section 50 of the Act to give search in the presence of either a Magistrate or a Gazetted Officer but they had declined to exercise that right. This is corroborated by the seizure panchanama Exh.26 as well as by the evidence of panch Dattu Khavale PW 2. When the personal search of the accused was taken a sum of Rs.31/- and 50 small packets of brown powder were recovered from the left side shirt's pocket of accused no.1 and a sum of Rs.20/- and 50 small packets of brown powder were recovered from shirt's pocket of accused no.2. Near the accused where they were sitting, a newspaper was found spread with 375 packets of brown sugar kept thereon. All the 375 packets which were found on the newspaper and 100 packets which were recovered from the shirt pockets of both the accused were weighed together. The weight of those 475 packets was 89.700

gms. The muddemal articles were wrapped in a separate paper and tied with a thread and thereafter the lakh seal was put on it. The label was also affixed on it with the signatures of API and the panchas. Thereafter the accused were arrested after informing them the reasons for their arrest. They were then brought at the police station and API Mohite filed his FIR at Exh.34 which also squarely corroborates the steps taken by the officer at the time of raid. On the basis of the FIR crime was registered. The muddemal articles were handed over to PI Chandgude which were deposited at the police station by making entry in the muddemal register by PW 1 Police Naik Ganpat Mashalkar. PW 1 Ganpat Mashalkar has deposed that he had received those muddemal articles in sealed condition and accordingly made entry in the muddemal register after putting the seal of the police station on it. He has also deposed that the said packet containing contraband was taken by him to the office of C.A. along with forwarding letter Exh.17. He had also produced original muddemal register at the time of the trial and the xerox copy thereof is on record at Exh.18. Thus, there was compliance with Section 55 of the Act. Even the muddemal articles were handed over to PI Chandgude under report Exh.36. Thereafter the report was filed by API Mohite to PI Chandgude as

required under Section 57 of the Act. The oral evidence of the witnesses has been fully and squarely corroborated by the documentary evidence like the gist of information reduced to writing, the endorsement of higher officer PI Chandgude, the handing over of the muddemal articles to officer-in-charge of the police station i.e. PI Chandgude as per Section 55 of the Act and submission of compliance report Exh.37 under Section 57 of the Act and the seizure panchanama Exh.26. The documentary evidence leaves no doubt about the correctness of the depositions of the three witnesses examined by the prosecution.

7. The trial court has, however, given benefit to the accused, firstly, on the ground that the panch is not an independent witness as he had acted as panch previously and that he was social worker and used to visit concerned police station in connection with the problems of the residents of the locality. In fact, the judgment in the case of Amarjit Singh Vs. State reported in 1990 Mah.L.R. 606 was cited before the learned Judge, in which it was held that the evidence of the panch cannot be discarded merely because he happened to be a panch witness in number of cases. Inspite of that, the trial court has observed that since the panch witness was a social worker and

visiting police station to solve the problems of the residents of the locality, he cannot be said to be an independent witness. The reasoning given by the trial court to discard the evidence of the panch is faulty and cannot at all sustain in law. If the panch was visiting the police station not for his own private work but to solve the problems of the residents of the locality, he was not getting any favour for himself and he was not approaching the police station for any favours to the residents of the locality but only with a view to air their grievances which is normally not liked by the authorities. Moreover, being a social worker he is expected to do his social duty as a panch and is not expected to act as panch with a view to oblige the police. He was not under any obligation of the police of the concerned police station. Therefore, the trial court has clearly erred in discarding the evidence of panch on the aforesaid ground.

8. Secondly, the trial court has raised doubt on the ground that as per the evidence of the witnesses 375 packets were kept on the newspaper spread on the ground in front of the accused but as at that time there was evening breeze it must not have been possible for the accused to make or prepare the

packets of brown sugar at the said place. It is true that the information received by the officer was that accused were at the place of incident and were preparing packets of small quantity of brown sugar but by the time the raiding party reached there the accused were not busy making or preparing packets. The packets were already prepared and kept on the newspaper. Whether the accused had lost some brown sugar because of the breeze is not the concern of the court but the fact remains that there was recovery of 375 packets which were kept on the newspaper and 100 packets were recovered from the shirt pockets of both the accused, which were sealed and seized under panchanama and were handed over to the police station and thereafter sent to the office of C.A. for analysis. It is relevant to point out that the accused though are stated to be sitting in an open place they were sitting on the rear side of public latrine under a shed and, therefore, it cannot be said that it was not possible for them to prepare packets of brown sugar in open public place when there was cold breeze at that time. The benefit given on that ground to the accused by the trial court is also not sustainable in law. In fact, at the end of paragraph 9 of the judgment, the trial court has observed, after discussing the evidence of three witnesses as

follows:-

> "....The evidence of Mohite is also similar to that effect and there is no contradiction in the evidence of Khavale, Mohite and the Panchanama Exh.26 and the complaint Exh.34."

9. The trial court has also raised doubt because at the time of seizure of muddemal articles API had put only button seal. He was not carrying the seal of the police station. But that cannot falsify the evidence about recovery because all the packets were wrapped in one paper and lakh seal was put thereon so also label was put bearing signatures of panchas and API, in which condition it was handed over at the police station where seal of the police station was also put in accordance with Section 55 of the Act. Merely because button seal of the cap was used by API the doubt cannot be created about the prosecution case because such buttons are only on the cap of the policemen as observed by the trial court. When the muddemal articles were deposited at the police station the seal of the police station was put thereon by PW 1 Police Naik Ganpat Mashalkar which was found to be intact even by the C.A. which is mentioned in the C.A. report Exh.38. C.A. report mentions that that office had received one sealed parcel and the seals on it were intact as per the copy sent. Therefore, there

is absolutely no reason to discard the case of the prosecution as no doubt could arise about the keeping the contraband articles under seal until it was forwarded to the office of the C.A. The fact that the contraband article was sealed at the place of incident is borne out by the seizure panchanama Exh.26 and the extract of the muddemal register Exh.18 shows that when muddemal article was received at the police station it was in sealed condition. Merely because the muddemal register does not mention that in addition office seal was affixed on the packet, the evidence of Police Naik Mashalkar PW 1 cannot be discarded when he deposed that he had received the muddemal article in sealed condition and had put the office seal of the police station. The trial court has also wrongly commented upon the 'Samaz-Patra' handed over to the accused persons apprising them of the ground of their arrest simply because said letters were given to the accused after the complaint was lodged.

10. We, thus, find that the reasoning given by the trial court for acquitting the respondents-accused are against the evidence on record and, therefore, cannot be sustained in law. The accused can be given benefit of doubt which must be reasonable and not fanciful.

The reasons of the trial court in the context of the evidence appear to be absolutely frivolous and, therefore, cannot be sustained. In our view the prosecution has squarely complied with the mandatory provisions under the Act and has proved the seizure of brown powder from the possession of the accused beyond any reasonable doubt.

11. The next question is what offence was committed by the accused. The accused were charged for possessing brown sugar under Section 21 and for conspiracy under Section 29 of the NDPS Act. They are, therefore, liable to be convicted for offence under Section 21 read with Section 17 as well as for offence under Section 21 read with Section 29 of the NDPS Act. For the offence of criminal conspiracy accused are liable to be punished with the punishment provided for the offence i.e. under Section 21 of the Act which could be in addition to the punishment that may be awarded for the main offence, which is for possession here. Section 21 before its amendment in October 2001 provided for minimum punishment which should not be less than 10 years and a fine of Rs.1 lac.

12. No doubt the offence was committed in this

case on 9/1/1993 and even the trial was over in the year 1994 and, therefore, the minimum punishment prescribed under Section 21 before the amendment could be imposed but for the amendment of October 2001. The Amendment Act No.9 of 2001 came into force on 2nd October, 2001. The amended provisions can be made applicable retrospectively to the extent provided by Section 41 of the Amendment Act. The said Section deals with the application of the amended provisions to the pending cases. Section 41 of the Amendment Act reads as follows:-

> "41. Application of this Act to pending cases.- (1) Notwithstanding anything contained in sub-section (2), of section 1, all cases pending before the courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence:
>
> Provided that nothing in this section shall apply to cases pending in appeal.
>
> (2) For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this Act has not come into force."

13. By Section 41 (1) the amended provisions are made applicable to all cases pending before the Courts or under investigation at the commencement of the Amendment Act and the person found guilty of any offence punishable under the principal Act is liable for punishment which is lesser than the punishment for which he was otherwise liable at the date of the commission of such offence. However, the proviso expressly prohibits the application of the amended provisions to the cases pending in appeal. If we read Section 41(1) together with the proviso it would mean that the amended provisions of the Act regarding lesser punishment will be applicable to cases pending investigation and trial on 2nd October, 2001 but will not be applicable to a case in which trial is disposed of before the above date, though the case may have been taken in appeal. In other words the amended provisions of the Act regarding lesser punishment will not be applicable to the pending appeals like this. Since this case was pending in appeal on the relevant date after the trial was disposed of on 27/1/1994, there would be a bar for applicability of the amended provisions of the Act.

14. However, on the basis of the judgment of the

Madhya Pradesh High Court in the case of **Ramesh vs. State of M.P. in Writ Petition No.537 of 2003** delivered by the Division Bench of that Court on 25/4/2003 striking down the proviso to Section 41 of the Act as being arbitrary and ultravires Article 14 of the Constitution of India and on the basis of the judgment of the Division Bench of the Punjab and Haryana High Court in the case of Ram Singh vs. State of Haryana reported in **2002 (3) Recent Criminal Reports (Criminal) 728** and the judgment of the Delhi High Court in the case of Hari Om vs. State reported in **2003 Cri.L.J. 979** in which the provisions of the new Act were applied, one of us (Coram: Parkar,J.) sitting singly has in the case of Diakite Ibrahim Adame vs. J.L. Pandey in Criminal Appeal No.586 of 1999 decided on 16/9/2003 and in similar other appeals applied provisions of the amended act so far as the punishment is concerned to cases which were disposed of before the Amendment Act came into force and were pending in appeal in this Court.

15. As the proviso to Section 41 of the Amendment Act is struck down, the bar of awarding lesser punishment in pending appeals is removed and, therefore, the sentence in this case can be awarded as per Section 21(b) of the amended Act.

16. In this case the total quantity of brown sugar recovered from the respondents-accused is 89.700 grams along with paper covers. In any event without the paper covers the quantity recovered from the accused will be more than 5 gms. which is the minimum quantity laid down under the new act but is lesser than commercial quantity which is 250 gms. and, therefore, the respondents-accused would be liable to be sentenced to the maximum imprisonment upto to 10 years and fine upto one lac rupees under Section 21(b) of the new act. From the record it appears that both the accused were arrested on 9/1/1993 and were released after the order of acquittal was passed on 27/1/1994 i.e. they were in custody for a period of more than one year. Considering the quantity recovered from these respondents-accused and the passage of more than ten years from the date they were acquitted, we are inclined to take a lenient view by sentencing them to imprisonment for a period already undergone by them on both the counts and imposing fine amount.

18. In the result, the appeal is allowed. The order of acquittal recorded by the Additional Sessions Judge, Pune on 27/1/1994 in Sessions Case No.103 of

1993 is quashed and set aside and both the respondents-accused are convicted, firstly, for offence under Section 21 read with Section 17 of the NDPS Act and secondly for offence under Section 21 read with Section 29 of the NDPS Act. For offence under Section 21 read with Section 17 of the NDPS Act both the respondents-accused are sentenced to imprisonment already undergone and to pay a fine of Rs.10,000/- each in default to suffer RI for six months. For offence under Section 21 read with Section 29 of the NDPS Act both the respondents-accused are sentenced to imprisonment already undergone and to pay a fine of Rs.10,000/- each in default to suffer RI for six months. Both the substantive sentences shall run concurrently. The amount of fine shall be paid within four weeks from today. The bail bonds of the respondents-accused shall stand cancelled after payment of fine. In case the fine amount is not paid within four weeks from today the respondents-accused shall be liable to be taken into custody for undergoing default sentences.

(S.S. Parkar, J.)

(S.R. Sathe,J.)